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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1904.

No. 517

FRANK D. THOMPSON
TRUSTEE IN BANKRUPTCY OF
HERBERT E. MOORE, BANKRUPT
PLAINTIFF IN ERROR

vs.

HENRY FAIRBANKS

IN ERROR TO THE SUPREME COURT OF THE STATE OF VERMONT

MOTION TO DISMISS OR AFFIRM.

C. A. PROUTY,
Attorney for the defendant.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1904

No. 117

FRANK D. THOMPSON
TRUSTEE IN BANKRUPTCY OF
HERBERT E. MOORE, BANKRUPT
PLAINTIFF IN ERROR

vs.

HENRY FAIRBANKS

IN ERROR TO THE SUPREME COURT OF THE STATE OF VERMONT

MOTION TO DISMISS OR AFFIRM.

Now comes Henry Fairbanks, defendant, and moves to dismiss the writ of error herein, or affirm the judgement, for the following reasons:

1. That this court has no jurisdiction.
2. That no federal question is involved.

C. A. PROUTY,
Attorney for the defendant.

BRIEF IN SUPPORT OF MOTION TO DISMISS.

STATEMENT OF CASE.

April 15, 1891, Fairbanks, the defendant in error, took a chattel mortgage from Moore, the bankrupt, of his livery stock located in St. Johnsbury, Vermont. The mortgage provided that Moore might sell and exchange the property; that he should by sale, exchange and renewal keep the property good, and that the mortgage should attach to after-acquired property. Moore continued in possession of the property under this mortgage until may 16, 1900, when Fairbanks took possession. At that time practically all the property was after-acquired. Moore was insolvent, as both he and Fairbanks knew. He consented that Fairbanks might take possession of the property, not with any intent to prefer him to other creditors, but because he understood that such was his legal right under the mortgage. June 11, 1900, Fairbanks sold the property. June 30, 1900, Moore filed a voluntary petition in bankruptcy, and Thompson was appointed his trustee. Thompson brought suit in the proper Vermont court to recover the value of the property so taken and sold, claiming that Fairbanks' lien under his mortgage and subsequent proceedings was valid as against bankruptcy creditors. The Supreme Court of Vermont gave judgment against Thompson, who thereupon sued out this writ of error, assigning as error that the Vermont court failed to properly apply certain provisions of the Bankruptcy Act of 1898. The defendant in error now files his motion to dismiss upon the ground that this court has no jurisdiction.

ARGUMENT.

Under the Bankruptcy Act of 1898 the trustee could only bring suit for the recovery of this property in the State court. Bardes *v.* Hawarden Bank, 178 U. S. 524, Wall *v.* Cox, 181 U. S. 244.

In the suit which he did so begin the highest court of the State has given final judgment against him. The Bankruptcy Act itself provides no method for reviewing that judgment in this court. It can only be reviewed, therefore, for the same reasons and upon the same grounds as though given upon some matter not connected with bankruptcy; in other words, a federal question must have been presented, must have been decided adversely to the plaintiff in error, and the judgment of the State court must necessarily have rested upon that decision.

The Vermont court held that the Fairbanks mortgage of 1891 was a valid common law mortgage as to the after-acquired property; that while such a mortgage might not be valid as against a sale, or a mortgage in due form, or an attachment, or perhaps an adjudication in bankruptcy so long as the mortgagee remained in possession, it gave the mortgagor, after condition broken, the right of possession, and that by taking such possession his title under the mortgage was perfected and *related back to the date of the mortgage itself.* The following is the language of the Supreme Court of Vermont upon this point:

> "The referee found that at the time this mortgage was given, it was agreed and understood by the parties thereto that the mortgagor should sell or exchange any of the livery stock covered by the mortgage as he desired, and should thereby and by purchase or otherwise keep the stock good so that the defendant's security should not be impaired; and that all after-acquired livery property should be covered by the

mortgage as security for the debts specified therein; that pursuant to such understanding and agreement, the mortgagor made sales, purchases, and exchanges of livery stock to such an extent that on May 16, 1900, when the defendant took possession of the property under his mortgage, there only remained two certain horses of the property on hand at the time the mortgage was given; that these sales, exchanges and purchases were made by the mortgagor, sometimes without communication with, or advice from the defendant, and frequently after consultation with him; that the livery stock as it existed when the defendant took possession of it was all acquired by exchange of the original stock or with the avails of the old stock sold, or the money derived from the business; and that all the property of which the defendant took possession was acquired by Moore with the full understanding and intent that it should be covered by the defendant's mortgage.

* * * * * *

"The property expressly described in the mortgage was the mortgagor's livery property, and the after-acquired property was, by the description, all horses and other livery property that he might purchase in his business or acquire by exchange. In principle there is no difference between a mortgage on such livery property with acquisitions by purchase or exchange to keep the property in quality and value equal to what it was when the mortgage is given, and a mortgage on a stock of goods with acquisitions by purchase to keep the stock from depletion by sales in the common course of business. That the mortgage in question is good at common law between the parties to it, and that when the mortgagee took possession of the property under it with the consent of the mortgagor, it became a good and valid mortgage on the property including that acquired subsequent to the giving of the mortgage, except as against intervening rights of creditors or other third persons, if any, and that such property came under the cover and operation of the mortgage as of

its date, are questions too well settled in this State to need further discussion. Peabody *v.* Landon, 61, Vt. 318; 15 Am. St. Rep. 903; Rice's Assignees *v.* Hulett, 63 Vt. 321; In re Allen's Estate, 65 Vt. 392; McLoud *v.* Wakefield, 70 Vt. 558."

The Vermont court held, therefore, that Fairbanks had title to this property as of April 15, 1891. This holding depended entirely upon the construction of the State law and is not reviewable by this court. If correct, it disposes of the case, for a title acquired in 1891 could not be affected by proceedings in bankruptcy begun in 1900. Whatever the Vermont court said later in its opinion as to the application of certain provisions of the bankruptcy Act was entirely unnecessary to the judgement finally rendered by that court. Hence this court has no jurisdiction, even though the State court did discuss a federal question and did decide that question adversely to the plaintiff in error.

"It is axiomatic that, in order to give this court jurisdiction on writ of error to the highest court of a State in which a decision in the suit could be had, it must appear affirmatively not only that a federal question was presented for decision by the highest court of the state having jurisdiction. but that its decision was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it. And where the decision complained of rests on an independent ground, not involving a federal question and broad enough to maintain the judgment, the writ of error will be dismissed by this court without considering any federal question that may also have been presented." California Powder Works *v.* Davis, 151 U. S. 389, 393; Eustis *v.* Bolles, 150 U. S. 361; Rutland Railroad Company *v.* Central Vermont Railroad Company, 159 U. S. 630; Harrison *v.* Morton, 171 U. S. 38.

The point passed upon by the Vermont court as above concerns the title of Fairbanks to the property, not the effect of bankruptcy proceedings upon that title; but this holding is decisive, for if he had such title as the court declared, there is no possible theory upon which bankruptcy could affect it. Scott *v.* Kelley, 89 U. S. 57.

C. A. PROUTY,

Attorney for Defendant.

And against an officer so attaching property, replevin, trespass and trover will lie.

Angell vs. Keith, 24 Vt. 371.

In the State Court the plaintiff claimed that, under the provisions of the United States Bankruptcy Law of 1898, the defendant by virtue of his mortgage, and the taking possession of the livery property thereunder, did not have a lien on said property good as against the plaintiff as trustee in bankruptcy. The decision of the Supreme Court of Vermont was against the claim of the plaintiff.

The specific claims raised in the court below are fully stated in the assignment of errors which are as follows:

1. The court erred in holding that the bankrupt's livery property did not pass to the plaintiff under section 70*a* of the United States Bankruptcy Law of July 1, 1898, 30 Stat. at L. 565, 566; and in failing to hold that the bankrupt's livery property did pass to the plaintiff under section 70*a* of the United States Bankruptcy Law of July 1, 1898, 30 Stat. at L. 565, 566.

2. The court erred in holding that the money obtained from the sale of the bankrupt's livery property on June 11, 1900, did not pass to the plaintiff under section 70*a* of the United States Bankruptcy Law of July 1, 1898, 30 Stat. at L. 565, 566; and in failing to hold that the money obtained from the sale of the bankrupt's livery property on June 11, 1900, did pass to the plaintiff under section 70*a* of the United States Bankruptcy Law of July 1, 1898, 30 Stat. at L. 565, 566.

3. The court erred in holding that the plaintiff could not recover the amount received by the defendant from the sale of the bankrupt's livery property on June 11, 1900, under section 70*c* of the United States Bankruptcy

Law of July 1, 1898, 30 Stat. at L. 566; and in failing to hold that the plaintiff could recover the amount received by the defendant from the sale of the bankrupt's livery property on June 11, 1900, under section 70*e* of the United States Bankruptcy Law of July 1, 1898, 30 Stat. at L. 566.

4. The court erred in holding that the defendant's chattel mortgage of April 15, 1891, was a valid lien against the bankrupt's estate under section 67*a* of the United States Bankruptcy Law of July 1, 1898, 30 Stat. at L. 564; and in failing to hold that the defendant's chattel mortgage of April 15, 1891, was not a valid lien against the bankrupt's estate under section 67*a* of the United States Bankruptcy Law of July 1, 1898, 30 Stat. at L. 564.

5. The court erred in holding that the plaintiff was not subrogated to the rights of the Passumpsic Savings Bank and of John Ryan, creditors of the bankrupt, as against the defendant's chattel mortgage of April 15, 1891, and could not enforce said rights against said mortgage of April 15, 1891, for the benefit of said bankrupt's estate under section 67*b* of the United States Bankruptcy Law of July 1, 1898, 30 Stat. at L. 564; and in failing to hold that the plaintiff was subrogated to the rights of the Passumpsic Savings Bank and of John Ryan, creditors of the bankrupt, as against the defend ant's chattel mortgage of April 15, 1891, and could enforce said rights against said mortgage of April 15, 1891, for the benefit of said bankrupt's estate, under section 67*b* of the United States Bankruptcy Law of July 1, 1898, 30 Stat. at L. 564.

6. The court erred in holding that upon Moore's being adjudicated a bankrupt under the provisions of the United States Bankruptcy Law of July 1, 1898, 30 Stat.

at L. 544, chap. 541, the defendant's rights under his chattel mortgage of April 15, 1891, stood the same as though the mortgage of March 5, 1900, had not been given to and assigned by him, or the Ryan attachment of May 7, 1900, made.

7. The court erred in holding that the property covered by the Ryan attachment of May 9, 1900, did not pass to the plaintiff under section 67*f* of the United States Bankruptcy Law of July 1, 1898, 30 Stat. at L. 565, upon Moore's being adjudicated a bankrupt.

8. The court erred in holding that the Ryan attachment of May 7, 1900, being made within four months prior to the filing of the petition in bankruptcy by Moore, the lien created thereby could be preserved for the benefit of the bankrupt's estate only by an order from the bankruptcy court for such purpose under section 67*f* of the United States Bankruptcy Law of 1898, 30 Stat. at L. 565.

9. The court erred in holding, that, without an order from the bankruptcy court preserving the same, the attachment of Ryan's of May 7, 1900, became absolutely null and void upon Moore's being adjudicated a bankrupt, under section 67*f* of the United States Bankruptcy Law of July 1, 1898, 30 Stat. at L. 565.

10. The court erred in holding that, upon Moore's being adjudicated a bankrupt, the property covered by the mortgage of March 5, 1900, did not pass to the plaintiff under section 67*e* of the United States Bankruptcy Law of July 1, 1898, 30 Stat. at L. 564.

11. The court erred in holding that, upon Moore's being adjudicated a bankrupt, the mortgage of March 5, 1900, became absolutely null and void under section 67*e* of the United States Bankruptcy Law of July 1, 1898, 30 Stat. at L. 564.

12. The court erred in holding that the defendant by virtue of his mortgage of April 15, 1891, and by taking possession of the livery property thereunder, had a lien on the said property so taken and sold paramount to the rights and title of the plaintiff under the United States Bankruptcy Law of July 1, 1898, 30 Stat. at L. 544, chap. 541.

13. The court erred in holding that the taking possession of the livery property of the bankrupt on May 16, 1900, by the defendant under his mortgage of April 15, 1891, brought said livery under the cover and operation of said mortgage as of its date, for that said holding is in violation of and contrary to the provisions of the United States Bankruptcy Law of July 1, 1898, 30 Stat. at L. 544, chap. 541.

14. The court erred in holding that the taking possession of the bankrupt's livery property on May 16, 1900, by the defendant under his chattel mortgage of April 15, 1891, was not a transfer of property rendered null and void under section 67*e* of the United States Bankruptcy Law of July 1, 1898, 30 Stat. at L. 574, upon the bankrupt's being adjudicated a bankrupt.

15. The court erred in holding that unless Moore parted with the possession of the livery property in question with a purpose on his part to hinder, delay or defraud his creditors, or any of them, his assent to the defendant's taking possession of said livery property would not constitute an invalid transfer thereof within the provisions of section 67*e* of the United States Bankruptcy Law of July 1, 1898, 30 Stat. at L. 564.

16. The court erred in holding that unless there was a finding that Moore parted with the possession of the livery property in question with the purpose on his part to hinder, delay or defraud his creditors, or any of them,

his assent to the defendant's taking possession of said livery property would not constitute an invalid transfer thereof within the provisions of section 67*e* of the United States Bankruptcy Law of July 1, 1898, 30 Stat. at L. 564.

17. The court erred in failing to hold that the taking possession of the bankrupt's livery property on May 16, 1900, by the defendant under his chattel mortgage of April 15, 1891, was a preference within the meaning of section 60*a* of the United States Bankruptcy Law of July 1, 1898, 30 Stat. at L. 562.

18. The court erred in holding that the taking possession of the bankrupt's livery property on May 16, 1900, by the defendant under his chattel mortgage of April 15, 1891, was not a preference voidable by the plaintiff under section 60*b* of the United States Bankruptcy Law of July 1, 1898, 30 Stat. at L. 562.

Error No. 19 is waived.

Argument.

I.

The first two errors assigned are that the Supreme Court of Vermont erred in holding that the bankrupt's livery property, or the money obtained from the sale of the same, did not pass to the plaintiff under section 70*a* of the Bankruptcy Act of 1898, and in failing to hold that said property, or the money obtained from the sale of the same, did pass to the plaintiff under said section 70*a*.

Section 70*a*, so far as material to this case, reads as follows: "The trustee of the estate of a bankrupt, upon his appointment and qualification, and his successor or successors, if he shall have one or more, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt, as of the

date he was adjudged a bankrupt, except in so far as it is to property which is exempt, to all xx (5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him."

If at the time the bankrupt filed his petition in bankruptcy his livery property was subject to either manner of disposition, above mentioned, it passed to the plaintiff as trustee of the bankrupt's estate.

Page vs. Edmunds, 187 U. S. 596.
In re Shenberger, 102 Fed. Rep. 978.
Chespeake Shoe Co. vs. Seldner, 122 Fed. Rep. 593.

The mortgage under which the defendant claims title was a common law chattel mortgage. (*Transcript of Record, pp. 51, 52, 55.*)

In Vermont the rule as to the sale of personal property is that, unless a change of possession accompanies and follows the sale, the conveyance is fraudulent *per se* and void as to the creditors of the vendor.

Fuller vs. Sears, 5 Vt. 527.
Weeks vs. Wead, 2 Aik. (Vt.) 64.
Harris vs. Langdon, 5 Vt. 231.
Farnsworth vs. Shepard, 6 Vt. 521.
Mills vs. Warner, 19 Vt. 609.
Hildreth vs. Fitts, 53 Vt. 684.

And such sale is void although the attaching creditor had full knowledge of the same.

Perrin vs. Reed, 35 Vt. 2.
Hart vs. Bank, 33 Vt. 252.
Weeks vs. Prescott, 53 Vt. 57.
Rice vs. Courtis, 32 Vt. 460.

The same rule as to the necessity of a change of possession applies to a common law chattel mortgage.

Tobias vs. Francis, 3 Vt. 425.
Woodward vs. Gates, 9 Vt. 358.
Russell vs. Fillmore, 15 Vt. 130.
Houston vs. Howard, 39 Vt. 54.
Wright vs. Vaughn, 45 Vt. 369.
Kitteridge vs. Freeman, 48 Vt. 62.

Prior to May 16, 1900, no possession of the bankrupt's livery property had ever been taken under the defendant's chattel mortgage of April 15, 1891. On May 16, 1900, the bankrupt was insolvent and contemplating bankruptcy, and all his property was under attachment, and all this the defendant and his attorney knew. At that time it was agreed between Mr. Stafford, the defendant's attorney, and Mr. Dunnett, the bankrupt's attorney, that the officer should take the livery property and sell it under the defendant's mortgage of 1891, and *hold the avails in place of the property for whoever turned out to be entitled thereto*, but at no time was it agreed or

understood that the avails of the sale might be applied upon the defendant's debt. *(Transcript of Record, pp. 15, 16.)*

Under that agreement the officer was not acting for and in behalf of the defendant, but was acting as the agent for all parties interested. He took possession of the property not for the purpose of perfecting the defendant's lien upon it, but for the purpose of preserving the property by converting it into cash, so that it could be divided among all the creditors of the bankrupt according to their respective rights. By the defendant's express agreement he acquired no greater rights by the officer taking possession of the property than he had before. No matter what his intentions were at the time the officer took possession of the property, he, himself, did not get possession of any of the property until the officer paid him the proceeds of the sale, which payment was presumably made on July 10, 1900, the day the officer made the return of the sale under the mortgage, about a week after the bankrupt was adjudicated a bankrupt. Therefore, at the time the petition was filed the avails of the sale were in the hands of the officer awaiting whoever was entitled to them, which person was the plaintiff, as at that time those avails could have been levied upon under judicial process against the bankrupt.

In re Allen's Estate, 65 Vt. 392.

The Supreme Court of Vermont, however, in deciding this case ignored the finding of the referee that the understanding was that the officer was to sell the property and hold the avails of the sale in place of the property for whoever turned out to be entitled thereto, and that the bankrupt did not consent that the avails of

the sale might be applied upon the defendant's debt, but treated the case as though the bankrupt gave his full consent and assistance to everything that the defendant did in applying this property to the payment of his debt, *(Transcript of Record, pp. 50, 52, 53)*, and the plaintiff will so treat the case in the remainder of his brief.

Prior to May 16, 1900, the bankrupt's livery property was subject to attachment by his creditors, whether with or without notice of the defendant's chattel mortgage. On May 7, 1900, nine days before the defendant took possession of the property, one John Ryan, a creditor of the bankrupt, sued out a writ against him, declaring therein in general assumpsit for $500 damages, and attached all this livery property. This attachment was, therefore, superior to the title the defendant got by taking possession of the property under his mortgage of 1891, and as the attachment was not dissolved until the bankrupt was adjudicated a bankrupt, at the time the bankrupt filed his petition in bankruptcy, and prior thereto, this property could have been taken and sold under judicial process against him. The plaintiff therefore took title to the property under section 70*a* (5) and can recover the value of the same from the defendant.

Page vs. Edmunds, 187 U. S. 596.
In Re Butterwick, 131 Fed. Rep. 371.
Desany vs. Thorp, 70 Vt. 31, 43.
Collender Co. vs. Marshall, 57 Vt. 232.
Stafford vs. Adair, 57 Vt. 63.

II.

The third error assigned is that the Supreme Court of Vermont erred in holding that the plaintiff could not recover the amount received by the defendant from the sale of the livery property, and in failing to hold that the

plaintiff could recover such amount under section 70*e* of the Bankruptcy Act of 1898.

Section 70*e* of the Bankruptcy Act of 1898 reads as follows:

"The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a bona fide holder for value prior to the date of the adjudication. Such property may be recovered or its value collected from whoever may have received it except a bona fide holder for value."

As shown by the cases above cited the mortgage of April 15, 1891, was invalid as against the creditors of the bankrupt until possession was taken by the defendant. So long as Ryan's attachment remained in force Ryan could have avoided any transfer of the property by the bankrupt, and especially the attempt to perfect the defendant's mortgage of 1891, and no sale of the property by the defendant could make it valid as against Ryan.

Thorp vs. Robbins, 68 Vt. 53.

Therefore since Ryan, a creditor of the bankrupt could have avoided the taking possession and sale of the bankrupt's livery property by the defendant, and could have recovered the proceeds of the sale from the defendant, at least to the amount of the attachment, the plaintiff, as the bankrupt's trustee, has the same right under section 70*e* of the Bankruptcy Law.

In Re Howland, 109 Fed. Rep. 869.

Skillen vs. Endelmen, 39 Misc. 261, 79 N. Y. Supp. 413, 11 Am. B. R. 766.

III.

The fourth and fifth errors assigned are that the

Supreme Court of Vermont erred in holding that the defendant's chattel mortgage of April 15, 1891, was a valid lien against the bankrupt's estate under section 67*a* of the Bankruptcy Law, and in failing to hold that the defendant's chattel mortgage of 1891 was not a valid lien against the bankrupt's estate under said section 67*a*; and in holding that the plaintiff was not subrogated to the rights of the Passumpsic Savings Bank and of John Ryan, creditors of the bankrupt, as against the defendant's chattel mortgage of April 15, 1891, and could not enforce said rights against said mortgage of 1891 for the benefit of said bankrupt's estate under section 67*b* of the Bankruptcy Law, and in failing to hold that he was subrogated to the rights of said Bank and of said Ryan as against defendant's said mortgage of 1891, and could enforce said rights against said mortgage for the benefit of said bankrupt's estate under section 67*b* of the Bankruptcy Law.

Section 67*a* of the Bankruptcy Law reads as follows:

"Claims which for want of record or for other reasons would not have been valid liens as against the claims of the creditors of the bankrupt shall not be liens against his estate."

Section 67*b* reads as follows:

"Whenever a creditor is prevented from enforcing his rights as against a lien created, or attempted to be created, by his debtor, who afterwards becomes a bankrupt, the trustee of the estate of such bankrupt shall be subrogated to and may enforce such rights of such creditor for the benefit of the estate."

Section 1 (29) of the Bankruptcy Act provides that "words importing the plural number may be applied to and mean only a single person or thing."

a. The defendant's mortgage of April 15, 1891, was

not a valid claim as against the claim of Ryan, because of want of possession before Ryan sued out his attachment.

Rice vs. Courtis, 32 Vt. 460.

In that case at page 469 the court said "But in this State we regard the want of change of possession as a fraud in law, so far as the processes of our courts are concerned. To that extent it is the same as if no sale had been made. And we have applied this rule to all personal chattels remaining within the State at the time of transfer and not exempt from attachment, and to all modes of transfer, whether of the absolute title, or the creating of a lien by way of pledge, or mortgage, or by assignment for the benefit of creditors. So that it will be necessary to show such a change of possession in the present case, in order to enable the plaintiff to hold the goods against the defendant's attachment."

So in the case at bar, as Ryan's attachment was valid and binding until the bankrupt was adjudicated a bankrupt, at the time the petition in bankruptcy was filed the defendant's mortgage of April 15, 1891, was not a valid lien as against the claim of Ryan, a creditor of the bankrupt, and it therefore is not a valid lien against the estate of the bankrupt, and the plaintiff can recover the proceeds of the sale of the property from the defendant.

In Re Andrae, 117 Fed. Rep. 561.

In Re Frazier, 117 Fed. Rep. 746.

Torrance vs. Winfield Nat. Bank, 66 Kan. 177, 71 Pac. Rep. 235.

In Re Pekin Plow Co. (C. C. A.) 112 Fed. Rep. 308.

In Re Thorp, 130 Fed. Rep. 371.

b. On March 5, 1900, there remained of the original livery property covered by the defendant's mortgage of April 15, 1891, only two horses, "Tom" and "Mattie,"

which brought at the sale of June 11, 1900, the sums of $42.50 and $26, respectively. *(Transcript of Record pp. 12, 13.)* All of the remaining property, although an attempt was made to cover it by the mortgage of April 15, 1891, was acquired subsequently to that date.

It is an elementary principal of law that one cannot convey by mortgage, or absolutely, personal property, which has no express or potential existence, as his property at the time of the conveyance.

Peabody vs. Landon, 61 Vt. 318, 328.

But a stipulation in a mortgage that future acquired property shall be covered by the mortgage "is an executory agreement of such a character, that the creditor with whom it is made may, under it, take the property into his possession, when it comes into existence, and is the subject of transfer by his debtor, and hold it for his security; and whenever he does so take it into his possession, before any attachment has been made of the same, or any alienation thereof, such creditor, under his executory agreement, may hold the same; *but, until such an act done by him, he has no title to the same;* and that, such act being done, and the possession thus acquired, the executory agreement of the debtor authorizing it, it will then become holden by virtue of a valid lien or pledge."

Moody vs. Wright, 13 Met. 17, 32.

Griffith vs. Douglass, 73 Me. 532; 40 Am. Rep. 395.

Cook vs. Corthell, 11 R. I. 482; 23 Am. Rep. 518.

Looker vs. Peckwell, 38 N. J. Law, 253.

On March 5, 1900, the bankrupt executed and delivered to the defendant another chattel mortgage of all his then livery property, and on March 23, 1900, the defendant made an assignment of this mortgage to the

Passumpsic Savings Bank, a creditor of the bankrupt, as follows; "Know all men by these presents, that I, Henry Fairbanks of St. Johnsbury in the county of Caledonia and State of Vermont, in consideration of one dollar paid to my full satisfaction by the Passumpsic Savings Bank of St. Johnsbury in the county of Caledonia and State of Vermont, *do hereby, assign, transfer and convey unto the said The Passumpsic Savings Bank, successor and assigns forever all my right, title, interest and estate in and unto the property conveyed by the within mortgage* and all my rights and privileges under said mortgage."

We maintain that, as to all the property acquired subsequently to April 15, 1891, this mortgage of March 5, 1900, conveyed a title superior to that of the mortgage of April 15, 1891, as the defendant had never taken possession of the same, and when the defendant assigned said mortgage to the Passumpsic Savings Bank it obtained a title to all of such after acquired property superior to any that the defendant might thereafter acquire under his mortgage of April 15, 1891; furthermore, the defendant by his assignment of March 23, 1900, did not convey to the Bank merely the title to said livery property obtained by his mortgage of March 5, 1900, but he transferred and conveyed to the Bank all his right, title and interest in and unto the property conveyed by the said mortgage, and that would include all the right, title and interest to the property which he had acquired under his mortgage of April 15, 1891, as the property conveyed by the mortgage of March 5, 1900, was the same property sought to be conveyed by the mortgage of April 15, 1891. Thereafter, as between the defendant and the Bank, the Bank was the owner of all the livery property, and after the defendant took possession of and sold said property under his mortgage of April 15, 1891,

as aforesaid, the Bank could have maintained a suit against him to recover the value of said property.

Longey vs. Leach, 57 Vt. 377.

But as the mortgage of March 5, 1900, was executed within four months prior to the bankrupt's filing his petition in bankruptcy, and the Bank was not a purchaser "for a present fair consideration," it was invalidated by the subsequent adjudication in bankruptcy, and the Bank was prevented from enforcing its rights as against the lien attempted to be created by the defendant by his taking possession of the livery property under his mortgage of April 15, 1891.

And as Ryan's attachment was made within the four months preceding the filing of the petition in bankruptcy by the bankrupt, he, also, was prevented from enforcing his rights as against the lien attempted to be created by the defendant by his taking possession of the livery property under his mortgage of April 15, 1891.

Therefore, the plaintiff as trustee of the bankrupt's estate, by the provisions of section 67*b* was subrogated to the rights of said Passumpsic Savings Bank, and said Ryan, and in this action is entitled to recover the proceeds of said sale.

In Re Howland, 109 Fed. Rep. 869.

In Re New York Economical Printing Co., 110 Fed. Rep. 514.

Patten vs. Carley, 69 App. Div. 425, 74 N. Y. Supp. 994.

Skillen vs. Endelmen, 39 Misc. 261, 79 N. Y. Supp. 413.

Gove vs. Morton Trust Co. (N. Y.) 12 Am. B. R. 297.

IV.

The 6th, 7th, 8th, 9th, 10th, and 11th errors assigned are as follows:

6. The court erred in holding that upon Moore's being adjudicated a bankrupt under the provisions of the United States Bankruptcy Law of July 1, 1898, 30 Stat. at L. 544, Chap. 541, the defendant's rights under his chattel mortgage of April 15, 1891, stood the same as though the mortgage of March 5, 1900, had not been given to, and assigned by him, or the Ryan attachment of May 7, 1900, made.

7. The court erred in holding that the property covered by the Ryan attachment of May 7, 1900, did not pass to the plaintiff under section 67*f* of the United States Bankruptcy Law of July 1, 1898, 30 Stat. at L. 565, upon Moore's being adjudicated a bankrupt.

8. The court erred in holding that the Ryan attachment of May 7, 1900, being made within four months prior to the filing of the petition in bankruptcy by Moore, the lien created thereby could be preserved for the benefit of the bankrupt's estate only by an order from the Bankruptcy Court for such purpose under section 67*f* of the United States Bankruptcy Law of July 1, 1898, 30 Stat. at L. 565.

9. The court erred in holding, that, without an order from the Bankruptcy Court preserving the same, the attachment of Ryan's of May 7, 1900, became absolutely null and void upon Moore's being adjudicated a Bankrupt, under section 67*f* of the United States Bankruptcy Law of July 1, 1898, 30 Stat. at L. 565.

10. The court erred in holding that, upon Moore's being adjudicated a bankrupt, the property covered by the mortgage of March 5, 1900, did not pass to the

plaintiff under section 67*e* of the United States Bankruptcy Law of July 1, 1898, 30 Stat. at L. 564.

11. The Court erred in holding that, upon Moore's being adjudicated a bankrupt, the mortgage of March 5, 1900, became absolutely null and void under section 67*e* of the United States Bankruptcy Law of July 1, 1898, 30 Stat at L. 564.

Section 67*e* reads as follows:

"That all conveyances, transfers, assignments, or incumbrances of his property, or any part thereof, made or given by a person adjudged a bankrupt under the provisions of this Act subsequent to the passage of this Act and within four months prior to the filing of the petition, with the intent and purpose on his part to hinder, delay, or defraud his creditors, or any of them, shall be null and void as against the creditors of such debtor, except as to purchasers in good faith and for a present fair consideration; and all property of the debtor conveyed, transferred, assigned, or encumbered as aforesaid shall, if he be adjudged a bankrupt, and the same is not exempt from execution and liability for debts by the law of his domicile, be and remain a part of the assets and estate of the bankrupt and shall pass to his said trustee, whose duty it shall be to recover and reclaim the same by legal proceedings or otherwise for the benefit of the creditors. And all conveyances, transfers, or incumbrances of his property made by a debtor at any time within four months prior to the filing of the petition against him, and while insolvent, which are held null and void as against the creditors of such debtor by the laws of the State, Territory, or District in which such property is situate shall be deemed null and void under this Act against the creditors of such debtor if he be adjudged a bankrupt, and such property shall pass to the assignee

and be by him reclaimed and recovered for the benefit of the creditors of the bankrupt."

Section 67*f* reads as follows:

"That all levies, judgments, attachments or other liens obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such levy, judgment, attachment or other lien shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid. And the court may order such conveyance as shall be necessary to carry the purposes of this section into effect. *Provided*, That nothing herein contained shall have the effect to destroy or impair the title obtained by such levy, judgment, attachment, or other lien of a bona fide purchaser for value who shall have acquired the same without notice or reasonable cause for inquiry."

The Supreme Court of Vermont held that the mortgage of March 5th, 1900, assigned by the defendant to the Passumpsic Savings Bank, became null and void under section 67*e*, and that Ryan's attachment of May 7th, 1900, became null and void under section 67*f*, upon the bankrupt being adjudicated a bankrupt, and that, with the Bank's mortgage and the attachment thus invalidated thedefendant's rights under his mortgage of April 15, 1891, stood the same as though there had been no subsequent mortgage given nor attachment made. The Court further

held that the only way the bankrupt's estate could benefit by Ryan's attachment was by obtaining an order from the Bankruptcy Court preserving such attachment for the benefit of the estate. *(Transcript of Record, pp. 47, 48.)*

This we claim was error.

The attachment of the livery property on Ryan's writ by the officer, by copy lodged in the Town Clerk's office, had the effect to vest the possession of the property in the officer so as to hold the property against all subsequent sales, or interference, as though the property had been actually removed and taken into the officer's actual possession.

Supra., p. 8.
Thorp vs. Robbins, 68 Vt. 53.
Barron vs. Smith, 63 Vt. 121.
West River Bank vs. Gorham, 38 Vt. 649.
Angell vs. Keith, 24 Vt. 371.

As the mortgage of 1891 was a common law chattel mortgage, and as the property in existence in May, 1900, was after acquired property, so long as the Ryan attachment was in force it was impossible for the defendant to perfect his lien by taking possession, as the rights of third parties had intervened, and the possession of the property was already in another person.

Peabody vs. Landon, 61 Vt. 318, 329.
Moody vs. Wright, 13 Met. 17, 33.
Re Allen's Estate, 65 Vt. 392.

The taking possession of the livery property by the defendant, and the sale of the same under his mortgage of April 15, 1891, was, therefore, an unlawful act, a trespass, and the attaching officer could have maintained trespass, trover or replevin against him for the property.

National Bank of Chelsea vs. Miller and Fitts, 67 Vt. 66.

Barron vs. Smith, 63 Vt. 121.

Arnold vs. Maroney, 17 R. I. 579, 23 Atl. 1101.

Drake on Attachment, §291.

Also, if our previous contention is correct, (*supra p. 21*), the assignment of the mortgage of March 5, 1900, by the defendant to the Passumpsic Savings Bank, gave to the Bank a title to all the livery property superior to any that the defendant could thereafter acquire under his mortgage of April 15, 1891.

If there had been no bankruptcy law in force at the time Fairbanks took possession and sold the mortgaged property, such proceedings would have given him no title superior to the Bank's mortgage, or the Ryan attachment, and the defendant so understood the latter fact. (*Transcript of Record, p. 15.*)

The main purpose which the Bankruptcy Law of 1898 seeks to accomplish is the equal distribution of the bankrupt's property *pro rata* among his creditors, and to further that equal distribution, certain liens obtained within four months of the filing of the petition in bankruptcy, are declared null and void upon the debtor being adjudicated a bankrupt.

Swarts vs. Fourth National Bank, (C. C. A.), 117 Fed. Rep. 1.

Buchannan vs. Smith, 16 Wall. 277.

And the rights of all claimants to the estate of the bankrupt are fixed by the status of their claims at the time of the filing of the petition in bankruptcy.

Swarts vs. Fourth National Bank, 117 Fed. Rep. 1.

In Re Bingham, (D. C. Vt.) 94 Fed. Rep. 796.

To hold, as the Supreme Court of Vermont did, that Moore's being adjudicated a bankrupt gave vitality to the defendant's taking possession of the livery property,

an act which, when made was a trespass, and was ineffectual for any purpose of priority over the Bank's mortgage or Ryan's attachment, and to then employ that act, thus vitalized, to defeat the primary object of the adjudication, which was the distribution of the bankrupt's effects for the equal benefit of all his creditors, is placing a construction upon the bankruptcy act which is demanded neither by its letter or spirit.

The filing of the petition in bankruptcy by the bankrupt did not dissolve the Bank's mortgage nor Ryan's attachment, but the adjudication of bankruptcy did, so, until the adjudication was made, the Bank's mortgage and Ryan's attachment were liens superior to the defendant's mortgage of April 15, 1891. The adjudication in bankruptcy could not have the retroactive effect to give the defendant a preference as of the date of his taking possession of the livery property, or of the date when the mortgage was executed, April 15, 1891, when at the time the defendant took possession of the livery property he acquired no priority of right over the Bank's mortgage or Ryan's attachment. The adjudication left the defendant's title just as it stood on the day the petition in bankruptcy was filed, but by virtue of sections 67*e* and 67*f*, it divested all the title and right of the bankrupt, and of the Bank under its mortgage, and also the qualified title and right vested in the deputy sheriff by virtue of the attachment under Ryan's writ, and vested them in the trustee, whose title related back to the time of the assignment of the mortgage to the Bank, and to the time of the attachment. To hold otherwise would be to defeat the whole policy and purpose of the Bankruptcy Act of 1898.

Reed vs. McIntyre, 98 U. S. 507.

In Re Badenheim, 15 N. B. R. 370, Fed. Cas. No. 716.

In Re Biesenthal, 14 Blatch. 146, Fed. Cas. No. 1236.

In Re Steele, 7 Biss., 504 Fed. Cas. No. 13,345.

In Re Andrae Co., 117 Fed. Rep. 561.

Beamer vs. Truman, 84 Cal. 554, 24 Pac. 169.

In *Beamer vs. Truman* a mortgage was executed November 4th, 1882, but was not recorded until August 13, 1886. August 11, 1886, two days before the mortgage was recorded, Baker & Hamilton, creditors of the mortgagor, placed an attachment upon the mortgaged property. August 20, 1886, the mortgagor was adjudged insolvent. The insolvency law of California provided that attachments made within one month prior to insolvency proceeding should be void.

The Court in holding that the attachment was not so absolutely discharged that the mortgagee could hold the property as against the assignee in insolvency, said: "We think it clear, however, that as Baker & Hamilton acquired a lien by attachment upon the engine before the mortgage upon it was recorded, as to them the mortgage is void, * * * * and the attachment levy prevented the title of the mortgagor from passing to the mortgagee.

"Now to hold that the release of the lien thereby made was absolute, and deprived them of all right to pursue the property in the insolvency matter, would give an advantage to the mortgagee, to their detriment, which, he, the mortgagee, failed to acquire in the first place by his laches in not recording his mortgage, and in effect, convert the Insolvent Act, which is designed to protect creditors, into an instrument of wrong against them. It must receive a reasonable construction in order to effectuate its object and promote justice. Applying this rule to it convinces us that the dissolution of the attachment made by it was not absolute so as to let the record of the

mortgage intervene and cut off the right of Baker & Hamilton and leave them, with other creditors, who might have been, up to that time, without recourse against the chattel, but only released the lien and transferred the title to the property to the assignee as part of the assets of the insolvent under section 17 of the above act. And as the title of the mortgagor was prevented from passing to the mortgagee by the attachment of Baker & Hamilton, it remained in the mortgagor until it was by the operation of law transferred to the assignee as the representative of all creditors. Such transfer made him the owner of the chattel, but in trust for the creditors of the insolvent, and, as such owner, he is entitled to recover either it or its value in order to execute his trust."

In *Reed vs. McIntyre*, one Shuey, on the 13th day of March, 1874, made an assignment to one W. S. Combs in trust for the benefit of his creditors. On the succeeding day Mrs. Reed, the appellant, obtained a judgment in one of the State Courts of Minnesota against Shuey, execution immediately issued, and was levied by the sheriff upon the same goods which Combs, as assignee of Shuey, had taken into his possession. Subsequently, on the 31st day of March, 1874, Shuey was petitioned into bankruptcy and was duly adjudicated a bankrupt, and McIntire, the appellee, was duly selected as his assignee in bankruptcy. The question was, whether, upon the assignment for the benefit of Shuey's creditors being set aside in favor of the assignee in bankruptcy, the appelant could hold the bankrupt's property under her judgment and execution as against the assignee in bankruptcy.

This Court in holding that she could not, said: "Since by the sheriff's levy appellant acquired no priority of right in, or lien upon, the goods how could the subsequent proceedings in bankruptcy have the retroactive effect to

give her a preference as of the date of the levy, when as between her and the creditors of Shuey she obtained no priority by virtue of that levy. * * * Appellant cannot use the adjudication in bankruptcy to give vitality to an execution levy, which, when made, was ineffectual for any purpose of priority, and then employ the levy, thus vitalized, to defeat the primary object of the adjudication, which was to distribute the bankrupt's effects for the equal benefit of all the creditors. * * * The adjudication in the Bankruptcy Court was for the purpose of bringing the bankrupt's effects into that court for distribution, and appellant cannot, by force of that adjudication secure a priority, which, without such adjudication, she would not have had. To hold otherwise would be to make the bankruptcy proceedings the instrument of defeating the wise and beneficent policy which the Bankruptcy Act was intended to subserve."

These cases, we think, establish conclusively that the Supreme Court of Vermont erred in their holding.

V.

The 13th, 17th, and 18th errors assigned are as follows:

13. The court erred in holding that the taking possession of the livery property of the Bankrupt on May 16, 1900, by the defendant under his mortgage of April 15, 1891, brought said livery property under the cover and operation of said mortgage as of its date, for that said holding is in violation of and contrary to the provisions of the United States Bankruptcy Law of July 1, 1898, 30 Stat. at L. 544, Chap. 541.

17. The court erred in failing to hold that the taking possession of the Bankrupt's livery property on May 16, 1900, by the defendant under his chattel mortgage of

April 15, 1891, was a preference within the meaning of section 60*a* of the United States Bankruptcy Law of July 1, 1898, 30 Stat. at L. 562.

18. The court erred in holding that the taking possession of the bankrupt's livery property on May 16, 1900, by the defendant under his chattel mortgage of April 15, 1891, was not a preference voidable by the plaintiff under section 60*b* of the United States Bankruptcy Law of July 1, 1898, 30 Stat. at L. 562.

The Supreme Court of Vermont refused to hold that the taking possession of the bankrupt's livery property on May 16, 1900, by the defendant under his chattel mortgage of April 15, 1891, was a preference within the meaning of section 60*a* of the Bankruptcy Law of 1898, *(Transcript of Record, pp. 50, 51)*, but did hold that the taking possession of the bankrupt's livery property on May 16, 1900, under and by virtue of the defendant's chattel mortgage of April 15, 1891, brought said livery property under the cover and operation of said mortgage as of its date, *(Transcript of Record, pp. 49, 50)*, which was in effect holding that such taking possession was not a preference within the meaning of section 60*a*, and further held that the defendant's taking possession of the livery property as he did, did not constitute a preference voidable by the plaintiff, as trustee, under section 60*b* of the Bankruptcy Law.

This we claim was error.

Section 60*a* of the Bankruptcy Law reads as follows:

"A person shall be deemed to have given a preference if, being insolvent, he has procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater per-

centage of his debt than any other of such creditors of the same class."

Section 60*b* reads as follows:

"If a bankrupt shall have given a preference within four months before the filing of a petition, or after the filing of the petition and before the adjudication, and the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person."

To render a transaction voidable under these two sections four essentials are necessary: first, the insolvency of the debtor; second, the obtaining by one creditor of a greater percentage of his debt than any other creditor of the same class; third, the giving of a preference within four months prior to the filing of the petition, and before the adjudication; and fourth, reasonable cause, on the part of the creditor, to believe that a preference was intended.

The referee found that at the time the defendant took possession of the bankrupt's livery property the bankrupt was insolvent, *(Transcript of Record, p. 13)*, and the evident effect of such possession will be to give to the defendant, a creditor, "a greater percentage of his debt than any other creditor of the same class."

Matthews vs. Hardt, (N. Y.) 79 App. Div. 570.

The next question is when was the transfer of the bankrupt's livery property made. Was it made on April 15, 1891, the date of the execution of the mortgage, and therefore more than four months before the bankrupt filed his petition in bankruptcy, or was it made when the defendant took possession of the livery property, and therefore within four months of the filing of the petition.

The general rule in Vermont in cases of chattel mortgages where possession by the mortgagee is necessary to perfect his title as against third persons is, that, although such possession is not taken until long after the execution of the mortgage, yet the taking actual possession of the mortgaged property brings it under the cover and operation of the mortgage as of its date, the time when the right of possession was first acquired, and, applying such rule to cases arising under the State Insolvency Law, the Supreme Court of Vermont has held that, when a chattel mortgage requiring possession of the mortgaged property to perfect it as to third persons, was executed more than four months before the commencement of insolvency proceedings, that the taking actual possession of the mortgaged property within the four months period brought the property under the mortgage as of its date, and so did not constitute a preference voidable by the trustee, although the other elements constituting a preference were present.

Peabody vs. Landon, 61 Vt. 318.
Rice's Assignees vs. Hulett, 63 Vt. 321.
In Re Allen's Estate, 65 Vt. 392.
McLoud vs. Wakefield, 70 Vt. 558.

The provisions of the State Insolvency Law in regard to void and voidable preferences and transfers were identical to similar provisions of the National Bankruptcy Law of 1867.

Gilbert vs. Vail, 60 Vt. 261.

Under the National Bankruptcy Law of 1867 it was held that the assignee in bankruptcy stood in the shoes of the bankrupt, that "except in cases of attachment against the property of the bankrupt within a prescribed time preceding the commencement of proceedings in bankruptcy, and except in cases where the disposition of prop-

erty by the bankrupt is declared to be fraudulent and void, the assignee takes the title subject to all equities, liens, or incumbrances, whether created by operation of law or by act of the bankrupt, which existed against the property in the hands of the bankrupt," and, under that Act, it was held that transfers of property invalid as to creditors because of want of possession or recording, but valid as between the parties, were also valid as against the assignee in bankruptcy.

Stewart vs. Platt, 101 U. S. 731.

Gibson vs. Warden, 14 Wall. 244.

And in deciding the case at bar the Supreme Court of Vermont, in construing sections 60*a* and 60*b*, followed the rule established under the United States Bankruptcy Law of 1867, and the State Insolvency Law, which we think was error.

Under the law of 1898 the trustee in bankruptcy stands more in the shoes of the creditors of the bankrupt, and any transfer of property, though perfectly good as between the parties thereto, if not good as against the creditors of the transferer for want of recording or change of possession, is not good as against the trustee in bankruptcy of the transferer.

Bankruptcy Act of 1898, Sections 70*a*, and 67*a*.

So in the case at bar if the defendant had failed to take possession of the livery property until after the bankrupt had filed his petition in Bankruptcy, the plaintiff, as trustee, would have taken all the property in dispute.

In Re Allen's Estate, 65 Vt. 392.

Page vs. Edmunds, 187 U. S. 596.

In Re Pekin Plow Co. (C. C. A.) 112 Fed. Rep. 308.

Haskell vs. Merrill, 179 Mass. 120.

Under the law of 1898 the intent of the parties to a transfer cuts no figure, it is the result obtained by the transferee as against the creditors of the transferer that is controlling.

Wilson Bros. vs. Nelson, 183 U. S. 191.

In Re Wright Lumber Co., 114 Fed. Rep. 1011.

Section 3*a* of the Bankruptcy Act, in defining acts of bankruptcy, declares that a transfer by a person, while insolvent, of "any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors" is an act of bankruptcy.

Section 3*b* provides that "a petition may be filed against a person who is insolvent and who has committed an act of bankruptcy within four months after the commission of such act. Such time shall not expire until four months after (1) the date of the recording or registering of the transfer or assignment when the act consists in having made a transfer of any of his property with intent to hinder, delay or defraud his creditors or for the purpose of giving a preference as hereinbefore provided, or a general assignment for the benefit of his creditors, if by law such recording or registering is required or permitted, or if it is not, from the date when the beneficiary takes notorious, exclusive or continuous possession of the property, unless the petitioning creditors have received actual notice of such transfer."

As the defendant's chattel mortgage was a common law chattel mortgage, and as the property sought to be covered by it was after acquired property, possession of the property by the defendant was necessary to perfect his title to said property under his mortgage, and as he did not take possession of said property until May 16, 1900, and as on that day the bankrupt was insolvent, and delivered the possession of the property to the defend-

ant with the intent to prefer him over his other creditors, as such was the necessary consequence of his act, *Toof vs. Martin, 13 Wall. 40, Wager vs. Hall, 16 Wall. 584,* the bankrupt on that day committed an act of bankruptcy for which a petition in bankruptcy might have been filed against him at any time within four months thereafter.

If the decision of the Supreme Court of Vermont is correct, we have the anomoly, that in computing the four months within which a petition in bankruptcy may be filed against an insolvent, and the four months within which a preference may be avoided by his trustee, two different methods of computing time are adopted. If the ruling of the Supreme Court of Vermont is followed the result will be that a person can be lawfully adjudged a bankrupt, because he has made a preferential transfer of his property, and a petition in bankruptcy has been filed against him within four months thereafter, but that his trustee cannot recover this property or its value from the transferee thereof, because as to him the transfer occurred more than four months before the petition in bankruptcy was filed. In the case at bar, if such a rule is followed, it results that, as an act of bankruptcy, the bankrupt's mortgage to the defendant was made on May 16, 1900, the day the defendant took possession of the property, but as a preference voidable by the trustee it was made on April 15, 1891. Such a holding is clearly erroneous as it destroys one of the great objects of the bankruptcy law, viz., the equal distribution of the debtor's property among his creditors.

Buckingham vs. McLean, 13 How. 151.
Whitley Grocery Co. vs. Roach, 115 Ga. 918, 42 S. E. 282.

In *Buckingham vs. McLean, supra,* at page 166, this Court said: "It cannot be supposed that what was in

itself an act of bankruptcy and done for the purpose of giving a preference over the general creditors, was intended to be left valid, and effectual to defeat one of the two great objects of the law, which were to grant a discharge to honest debtors who should conform to its provisions, and to distribute their property ratably among all their creditors."

In *Pirie vs. Chicago Title & Trust Co., 182 U. S. 438*, this Court in construing section 60*a*, at page 144, said: "Transfer is defined to be not only the sale of property but 'every other and different mode of disposing of or parting with property.' All technicality and narrowness of meaning is precluded. The word is used in its most comprehensive sense, and is intended to include every means and manner by which property can pass from the ownership and possession of another, and by which the result forbidden by the statute may be accomplished, a preference enabling a creditor 'to obtain a greater percentage of his debt than any other creditor of the same class,'" and on page 449 the Court, in speaking of the Bankruptcy Act of 1898, further said: "Undoubtedly all the sections of the act must be construed together as means to effect its purpose."

Following that rule, bearing in mind that one of the great objects of the Bankruptcy Law is the equal distribution of the bankrupt's unexempt property among his creditors, if we construe section 3*b* in connection with section 60*b*, and if we take into consideration the facts, that the essential element in a preferential transfer is the result obtained by the creditor from such transfer, and that in regard to all transfers of the bankrupt's property the trustee stands in the shoes of the bankrupt's general creditors, and that in the case at bar the only means and manner by which the ownership and possession of the

bankrupt's livery property as against his creditors could pass from him to the defendant, was by the defendant taking the actual possession of the property, the conclusion must be, that, notwithstanding the previous decisions of the Supreme Court of Vermont, under the provisions of the Bankruptcy Act of 1898, the four months within which a voidable preference can be given, begin to run from the date of the recording or registering of the transfer, or from the date when the beneficiary takes notorious, exclusive or continuous possession of the transferred property.

Wilson Bros. vs. Nelson, 183 U. S. 191.
In Re Sheridan, 98 Fed. Rep. 406.
In Re Klingaman, 101 Fed. Rep. 691.
In Re Ronk, 111 Fed. Rep. 154.
Babbitt vs. Kelley, 96 Mo. App. 529, 70 S. W. 384.
Landis vs. McDonald, 88 Mo. App. 335.
Matthews vs. Hardt, (N. Y.) 79 App. Div. 570.
In Re Ball, 123 Fed. Rep. 164.
In Re Mandel, 127 Fed. Rep. 863.
Anniston Iron & Supply Co. vs. Rolling Mill Co. 125 Fed. Rep. 974.
Tatman vs. Humphrey, 184 Mass. 361.

In *Wilson Bros. vs. Nelson, supra*, the defendant Nelson on Feb. 5, 1885, executed and delivered to one Sarah Johnstone his promissory note for $8960, to which was attached an irrevocable power of attorney authorizing any attorney of any court of record in his name, to confess judgment thereon after maturity of the note. November 21, 1898, Sarah Johnstone caused judgment to be duly entered upon the note and warrant of attorney for the amount of the note and costs. The court, in holding that the failure of the defendant to avoid the

judgment within five days of a sale of the property upon execution issued on the judgment, was an act of bankruptcy, said:

"In the case at bar, the warrant of attorney to confess judgment was indeed given by the debtor nearly thirteen years before. But being irrevocable and continuing in force, the debtor thereby, without any further act of his, 'suffered or permitted' a judgment to be entered against him, within four months before the filing of the petition in bankruptcy, the effect of the enforcement of which judgment would be to enable the creditor to whom it was given to obtain a greater percentage of his debt than other creditors; and the lien obtained by which, in a proceeding begun within the four months, would be dissolved by the adjudication in bankruptcy, because 'its existence and enforcement will work a preference.'"

In the case of *Re Klingaman, supra*, decided in the District Court of Iowa, the facts were as follows: June 17, 1898, Luthy & Co. sold to Klingaman, who was not bankrupt at that time, an order of twine, taking a statement stipulating that the goods were "pledged and hypothecated" to them as security for the payment of the purchase price. This under the Iowa statute constituted an equitable lien upon the goods which could be enforced at any time, but it was not recorded. August 1, 1898, Luthy & Co., having learned that Klingaman was insolvent, took back the unsold twine and credited Klingaman with $100, on the notes given for the purchase price. Klingaman was adjudged a bankrupt August 12, 1898. Luthy & Co. filed their claim against his estate for the balance due on the notes. The question was if they had received a preference. If the transfer dated from June 17 1898, the date of the giving of the lien, it was not a preference, as Klingaman was not insolvent at that time,

but if it dated from August 1, 1898, the day Luthy & Co. took possession of the twine, it was a preference. The court in holding that the transfer was made on August 1, 1898, said "Under the prior Act of 1867, the preference was held to have been given when a lien, valid between the parties thereto, was created, although no notice was given to the other creditors. Under the present act a preference is not created until notice thereof is given to the other creditors, either by recording or registering the instrument of transfer, or by taking actual or open possession of the property by the creditors. It does not seem possible that Congress did not intend this change in the rule to apply to questions arising between a creditor claiming the benefit of a preference and the other creditors. * * * In my judgment, it was the purpose of this enactment to declare generally that, with respect to acts of bankruptcy consisting of making transfers of property when insolvent with intent to give a preference, the act is to be held to have been committed when the transfer is made effectual as against other creditors by recording or registering the instrument of transfer, or by the beneficiary taking actual and open possession of the property, or by otherwise giving actual notice of the transfer to creditors. In other words, the intent of this section, is to declare that, as against creditors of an insolvent, the limitation of time for invoking relief against a preference does not begin to run until in some form they have received actual or constructive notice of the transfer to the preferred creditor; and this intent is reached by the declaration that in such cases the transfer constituting the act of bankruptcy "shall be held to date from the time the instrument of transfer is recorded, or the possession is taken, or notice is otherwise brought home to the creditors of the bankrupt."

In New York, under the State Insolvency Law, the courts held that a mortgage executed within the prohibited time while the debtor was insolvent, in pursuance of a previous agreement was to be treated as of the date of the agreement, that "the date of the agreement pursuant to which any transfer is made and not the date when the conveyance is in fact executed, is to be regarded." In the case of *Matthews vs. Hardt, supra*, the court held that the decisions under the State Law were not applicable to the Act of 1898. In that case an agreement was made between the bankrupt corporation and the defendants more than four months before the commencement of bankruptcy proceedings, by which the defendants were to make advances to enable the bankrupt to go on in its business, and if at any time in the future when the firm had advanced an amount stipulated, the bankrupt failed to pay back such advances, the defendants were to have a lien for the same upon the property of the bankrupt.

The defendant advanced the money as agreed, but the bankrupt failed to keep its part of the agreement. Within four months prior to the filing of a petition in bankruptcy against the bankrupt corporation, and while it was insolvent, the defendants took possession of the bankrupt's property under its agreement and sold the same. The court held that this constituted a preference within the meaning of section 60*b* and was voidable as to the trnstee.

The court, after reviewing the cases under the State Law, said "The trend of the decisions in the United States Supreme Court under the recent Bankruptcy Act upon the subject of the transfer, is in support of the view that, with respect to an instrument of transfer, it is the time when such instrument is recorded, or when possession is taken or notice is otherwise brought home to the creditors of the bankrupt that is controlling."

In *Tatman vs. Humphrey, supra*, an unrecorded chattel mortgage was given by the bankrupt to the defendant more than two years before the commencement of bankruptcy proceedings. The defendant did not take possession of the mortgaged property under his mortgage until about three weeks before the commencement of bankruptcy proceedings, the mortgagor at that time being insolvent, and the defendant having reasonable cause to believe him insolvent. The Supreme Court of Massachusetts held that although the defendant's acquisition of possession of the mortgaged property before the commencement of the proceedings in bankruptcy, and before third person had acquired liens or rights by attachment or otherwise, gave him a title which was good at common law against creditors, and which would have been good against an assignee in insolvency under the statutes of Massachusetts, or against an assignee in bankruptcy under the United States Bankruptcy Act of 1867, yet under the Bankruptcy Act of 1898 the four months period dates from the acquisition of possession under the mortgage, and the defendant's taking possession of the mortgaged property as he did, constituted a preference voidable by the trustee under section 60*b*.

In *Re Ball, supra*, was a case in the District Court of Vermont. It was a case of a chattel mortgage covering after acquired property. The mortgage was executed long before the commencement of bankruptcy proceedings, but the mortgagee did not take possession of the after acquired property until within four months prior to the filing of the petition in bankruptcy, and she then had reasonable cause to believe that the mortgagor was insolvent. Judge Wheeler, in holding that such taking possession constituted a voidable preference within the meaning of sections 60*a* and 60*b* said: "The possession,

which was long within the four months, was the operative thing that would work a preference under 60 cl. 'a'; and such a preference is voidable by the trustee under clause 'b'. The preference, as such, was given by the bankrupt when his giving could be, and was carried into effect."

Applying such a rule to the case at bar the four months period began to run on May 16, 1900, the day on which the defendant took possession of the mortgaged property, and his taking possession of the mortgaged property on that day constituted a preference voidable by the plaintiff, as trustee, if he, or his agent acting therein, had reasonable cause to believe that it was intended thereby to give a preference.

The Supreme Court of Vermont held that there was no finding in the referee's report "that the defendant, or his agent, had reasonable cause to believe that by the change of possession it was intended to give a preference." *(Transcript of Record, p. 51)* But we maintain that there is such a finding in the report.

The referee found that although the defendant took possession of the livery property under his mortgage of April 15, 1891, with the consent of the bankrupt, and on June 11, 1900, caused the same to be sold at public auction by the sheriff, *(Transcript of Record, p. 13)*, yet, he further found that the arrangement between the defendant's attorney, who had the matter in charge, and the bankrupt and his attorney, was that the officer was to take possession of and sell the property under the defendant's mortgage, and hold the avails of the sale in place of the property for whoever turned out to be entitled thereto, and neither the bankrupt nor his counsel consented that the avails of the sale might be applied on the defendant's debt. *(Transcript of Record, p. 16)*. The referee further

found that at the time the officer so took possession of the livery property, the defendant knew that the bankrupt was insolvent and was considering going into bankruptcy, that Ryan had an attachment upon the property which would probably hold good as against his mortgage, and that he had the officer take possession with the intent thereby to perfect his lien on the livery property and make it available for the payment of his debt before other complications by way of attachment or bankruptcy arose, and when the officer sold the property he, the defendant, received the proceeds of the sale and applied them upon his debt. (*Transcript of Record, pp. 13, 15.*)

It is thus seen that while at the time the officer took possession of the livery property the bankrupt did not intend to prefer the defendant, yet the defendant while apparently agreeing that the officer should sell the property and hold the avails of the sale in lieu of the property for whoever might be entitled thereto, really intended by the officer's taking possession and selling the property to perfect his lien upon the property and make it available for the payment of his debt before the bankrupt went into bankruptcy, or other attachments were placed on his property.

The facts, we think, establish conclusively that the defendant had reasonable cause to believe that by the change of possession of the livery property a preference was intended.

Under the statute intent on the part of the debtor is not necessary, The requirements of the law are fulfilled if there is an intention on the part of the creditor who brings about or procures the transfer. If the transaction is conducted within the four months, and it has the effect to give the creditor who conceives and executes it a larger percentage of his claim than other creditors of the same

class it clearly comes under the ban of the law. In the case at bar the defendant knew that his own intention and purpose was to secure a preference by making his debtor's property available for the payment of his debt before the debtor went into bankruptcy. He clearly had reasonable cause to know that a preference was intended because he must have known and intended the consequences of his own acts.

Western Tie & Timber Co. vs Brown, (C. C. A.), 129 Fed. Rep. 728.

In that case one Harrison was adjudged a bankrupt on February 24, 1903. Prior to that time he conducted two stores and sold supplies to the laborers employed by the plaintiff. It was customary for the plaintiff to deduct from the wages due each workman the price of the supplies Harrison had furnished him, and send to Harrison the price of all the supplies he had furnished to the laborers. This course of dealing had been followed for many months prior to October 24, 1902, four months before the filing of the petition in bankruptcy. On that day Harrison owed to the plaintiff more than $20,000. During the month of December he applied to the plaintiff to advance him more money, and it refused his request. Thereafter when the pay rolls for December, 1902, and January and February, 1903, came in, the plaintiff, instead of sending to Harrison, as it had been accustomed to do, the price of the supplies which he had delivered to the men, credited him with this amount, which aggregated $2210.73, and in this way secured a payment of this amount upon its claim against him. The Court in holding that the transaction constituted a voidable preference said: "But an intention on the part of the insolvent to give a preference by means of a transfer which he makes is not always indispensable to its

existence. It is sufficient if he has given the preference, and the party receiving it has reasonable cause to believe 'that it was intended thereby to give' it. The statute does not require that it should be intended by the debtor, but is fully satisfied by the existence of an intention on the part of the actor—the person who procures, brings about, or effects the transfer. The preferences denounced by the statute are often secured by creditors without any desire or intention on the part of the debtors to give them, as in cases in which the creditors obtain judgments against their debtors over defenses made to the actions in good faith, and in cases, like that at bar, where, without the consent of their debtors, creditors appropriate to the payment of their claims the property of their debtors which happens to be under their control. Such transactions are none the less voidable preferences, that the debtors do not intend them to have that effect. If they are conducted within the four months, and if they have the effect to give to the creditors who conceive and execute them larger percentages of their claims than other creditors of the same class receive, they fall as clearly under the ban of the law as transfers made by debtors with the intent on their part to give the preferences. Such a transaction is voidable by the trustee not only when the party receiving it has reasonable cause to believe that it was intended by the debtor, but also when it was intended by the creditor, or by the actor who accomplished the result, to work a preference by means of the transaction. The tie company in this case had reasonable cause to believe that the transaction which it conducted was intended to give a preference over the other creditors of Harrison in its class. Indeed, it knew that this was the object of the transaction. It knew that its own intention and purpose was to secure

such a preference by applying the debt it owed to Harrison for the supplies in part payment of its large claim against him for money advanced, and it attained its object, at least temporarily. The transaction fell fairly within the terms of section 60, and it constituted a voidable preference."

The Supreme Court of Vermont, however, in deciding the case, ignored the fact that the bankrupt only consented that the property might be sold by the officer and the avails held by him in lieu thereof, and that he did not consent that the proceeds of the sale might be applied on the defendant's debt. That Court treated the case as though everything that the defendant did in making the livery property available for the payment of his debt was done with the express consent and approval of the bankrupt. *(Transcript of Record, pp. 50–53.)* But treating the case as that Court did, we maintain there is a finding in the referee's report that the defendant had reasonable cause to believe that a preference was intended.

At the time the bankrupt delivered the livery property to the defendant he was insolvent and contemplating bankruptcy, and the defendant knew this. The necessary and logical consequence of that act was to prefer the defendant over the bankrupt's other creditors, and such a transfer is conclusive evidence of an intent to prefer, as every man is presumed to intend the necessary consequences of his acts.

Toof vs. Martin, 13 Wall. 40.
Wager vs. Hall, 16 Wall. 584.
Goldman, Beckman & Co. vs. Smith, 93 Fed. Rep. 182.
In Re Rome Planing Mills, 96 Fed. Rep. 812.
In Re McLam, 97 Fed. Rep. 922.
Johnson vs. Wald, (C. C. A.) 93 Fed. Rep. 640.

In Re McGee, 105 Fed. Rep. 895.
In Re Bloch, (C. C. A.) 109 Fed. Rep. 790.
In Re Wright Lumber Co., 114 Fed. Rep. 1011.
Read vs. Moody, 60 Vt. 668.

In *Toof vs. Martin, supra*, this Court said: "It is a general principle that every one must be presumed to intend the necessary consequences of his acts. The transfer, in any case, by a debtor, of a large portion of his property, while he is insolvent, to one creditor, without making provision for an equal distribution of its proceeds to all his creditors, necessarily operates as a preference to him and must be taken as conclusive evidence that a preference was intended, unless the debtor can show that he was at the time ignorant of his insolvency, and that his affairs were such that he could reasonably expect to pay all his debts. The burden of proof is upon him in such case, and not upon the assignee or contestant in bankruptcy," and in the case of *In Re Bloch, supra*, the Court said: "The fact of an intent sufficiently appears from the insolvency and the preference."

Since, therefore, the necessary and logical consequence of the bankrupt's act, in delivering all of his livery property to the defendant, was to prefer the defendant, and as the defendant, at that time, knew that the bankrupt was insolvent and contemplating bankruptcy, and as he intended, by taking the property as he did, to make it available for the payment of his debt before further complications by way of attachment or bankruptcy arose, he cannot now be heard to say that he did not have reasonable cause to believe that by such transfer of property a preference was intended.

In Re Wright Lumber Co., 114 Fed. Rep. 1011.

Furthermore the facts that at the time the defendant delivered his livery property to the defendant

he was insolvent, that he delivered his entire stock, that he was at that time contemplating bankruptcy, that the defendant knew all this, and by taking possession of the property intended to make it available for the payment of his debt before proceedings in bankruptcy were begun, necessarily include the further fact that at that time the defendant had reasonable cause to believe that by the change of possession of the livery property a preference was intended.

Lewis and Leach vs. Burlington Savings Bank, 64 Vt. 626.
Read vs. Moody, 60 Vt. 668.
Buchanan vs. Smith, 16 Wall. 277.
Wager vs. Hall, 16 Wall. 584.
Toof vs. Martin, 13 Wall. 40.
Sebring vs. Wellington, (N. Y.) 63 App. Div. 498.

Lewis and Leach vs. Burlington Savings Bank, supra, was assumpsit by the plaintiff, as assignees in insolvency of Albert Sowles, to recover the value of certain alleged preferences paid the defendant by Sowles within four months of the filing of the petition in insolvency. The alleged preference consisted in the payment of a debt within the four months preceding insolvency proceedings. The referee, before whom the facts were tried, found that at the time the payment was made the creditor had reasonable cause to believe the debtor was insolvent, but he did not find that the creditor had reasonable cause to believe that the payment was made in fraud of the insolvent law. The Court in holding that that fact was necessarily included in the findings of the referee said: "Then we have presented for consideration the question whether in the case of one who has received full payment of his demand, a finding that he had reasonable

cause to believe the debtor insolvent in the ordinary sense necessarily involves the fact that he had reasonable cause to believe that the payment was made in fraud of the insolvent law. It is evident that payment in full from one who has not the means to pay all his creditors in full must necessarily prevent that equal distribution of his assets which it is the object of the insolvent law to secure. Such a payment is, therefore, a payment in fraud of the law. It seems clearly to follow that when the payment received is payment in full, and the one receiving it has reasonable cause to believe that the payor is insolvent in the sense indicated, he has reasonable cause to believe that such payment is made in fraud of the law. The first two facts necessarily include the third."

In the other cases cited the Courts held that if the debtor was in fact insolvent as alleged, and that the means of knowledge were at hand, and that such facts and circumstances were known to the grantee as were clearly sufficient to put a person of ordinary prudence and discretion upon inquiry, it is well settled that it would be his duty to make all such reasonable inquiries to ascertain the true state of the case, and if he fails to investigate when put upon inquiry, he is chargeable with all the knowledge which it is reasonable to suppose he would have acquired if he had performed his duty in that regard.

The case at bar is much stronger than any of these cases, because here the defendant knew when he took possession of the livery property that his debtor was insolvent and considering going into bankruptcy, and he took possession of the property for the sole purpose of making it available for the payment of his debt before bankruptcy proceedings were begun.

We therefore maintain that all the essentials necessary

to render a transaction voidable under sections 60*a* and 60*b* were present in the transaction at bar, and that the decision of the Supreme Court of Vermont that the defendant's taking possession of the bankrupt's livery property on May 16, 1900, under his chattel mortgage of April 15, 1891, did not constitute a preference voidable by the plaintiff under section 60*b* of the Bankruptcy Act was erroneous and should be reversed by this Court.

VI.

The 14th, 15th and 16th errors assigned are that the Supreme Court of Vermont erred in holding that the defendant's taking possession of the bankrupt's livery property on May 16, 1900, under his chattel mortgage of April 15, 1891, was not a transfer of property rendered null and void under section 67*e* of the Bankruptcy Act of 1898.

The Supreme Court of Vermont held that there was no finding by the referee that when the bankrupt delivered the livery property to the defendant on May 16, 1890, "that the thus parting with the possession of the property by the mortgagor was with the purpose on his part to hinder, delay, or defraud his creditors, or any of them," and that "without a finding to this effect, it cannot be said that there was any invalid transfer of the property within the provisions of section 67*e*, of the Bankrupt Law." *(Transcript of Record, p. 50).*

It is true that the referee did not find that the bankrupt parted with the possession of his livery property with the intent to hinder, delay or defraud his creditors or any of them, on the contrary the referee found that the bankrupt never consented that the defendant might take possession of the livery property under his chattel mortgage of April 15, 1891, for the purpose of perfecting his

lien thereunder. The Supreme Court of Vermont, however, treated the case as though everything the defendant did in taking the livery property under his mortgage of April 15, 1891, and applying it upon his debt, was done with the consent, approval and aid of the bankrupt. *(Transcript of Record, pp. 50–53.)*

But treating the case as the Supreme Court of Vermont did the bankrupt did deliver the livery property to the defendant with the intent on his part to hinder, delay, and defraud his other creditors for that was the logical and legal consequence of his act, and as we have before stated, every man is presumed to intend the necessary consequence of his own acts.

Toof vs. Martin, 13 Wall. 40.
Wager vs. Hall, 16 Wall. 584.
Goldman, Beckman & Co. vs. Smith, 93 Fed. Rep. 182.
In Re Rome Planing Mills, 96 Fed. Rep. 812.
In Re McLam, 97 Fed. Rep. 922.
Johnson vs. Wald, (C. C. A.) 93 Fed. Rep. 640.
In Re McGee, 105 Fed. Rep. 895.
In Re Bloch, (C. C. A.) 109 Fed. Rep. 790.
In Re Wright Lumber Co., 114 Fed. Rep. 1011.

And as was said in the case of In Re Bloch, supra, "The fact of an intent sufficiently appears from the insolvency and the preference." There was therefore, a sufficient finding in the referee's report that the bankrupt parted with the possession of the livery property with the intent on his part to hinder, delay and defraud his creditors.

And if, as we have maintained, the four months began to run from the time when the defendant took the actual and notorious possession of the livery property, the

transfer was clearly within the provisions of section 67*e*, and was rendered null and void by the bankrupt's adjudication in bankruptcy, and the property would pass to the plaintiff, as the bankrupt's trustee.

Therefore, for the reasons above stated, we maintain that the decision of the Supreme Court of Vermont was erroneous and should be reversed by this Court.

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